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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO,

PETITIONER

v.

NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, Jr., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

	Page Number
OPINION BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
STATUTES INVOLVED	4
STATEMENT	4
Background	4
Actions of the Board	5
Actions of the Court Below	7
REASONS FOR GRANTING THE WRIT	8
CONCLUSION	14
APPENDICES	15
A. Judgment of District Court	15
B. Complaint	17
C. Exhibit 5 to Complaint ("Findings Upon Investigation" of National Mediation Board)	27
D. Exhibit 7 to Complaint (Telegram of National Mediation Board)	29
E. Constitutional and Statutory Provisions Involved	30

CITATIONS

Cases	Page Number
Accardi v. *Shaughnessy*, 347 U. S. 260	9, 10, 11, 13
Airline Stewards and Stewardesses Association, International v. *National Mediation Board, et al.*, U. S. App. D. C. No. 16340	3
Bolling v. *Sharpe*, 347 U. S. 497	3
Leedom v. *Kyne*, 358 U. S. 184	9-10, 11
Minneapolis & St. Louis Ry. Co., National Mediation Board, Case No. R-2767 (April 2 and June 17, 1954)	10
Order of Conductors v. *Penn. R. Co.*, 323 U. S. 166	11, 12
Schilling v. *Rogers*, 363 U. S. 666	9-10
Securities and Exchange Commission v. *Chenery Corp.*, 317 U. S. 80	10
Service v. *Dulles*, 354 U. S. 363	10
Switchmen's Union v. *Board*, 320 U. S. 297	3, 9
Taylor v. *McElroy*, 360 U. S. 709	3
UNA Chapter, Flight Engineers' International Association, AFL-CIO v. *National Mediation Board, et al.*, No. 531, October Term, 1961, petition for certiorari pending	2-3, 4, 8, 11, 13, 14
United Air Lines, National Mediation Board, Case No. R-1894 (October 10, 1947)	10
Vitarelli v. *Seaton*, 359 U. S. 535	10

Miscellaneous

	Page Number
Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*:	
Section 2, Third, 45 U.S.C. § 152, Third	6, 11, 13
Section 2, Fourth, 45 U.S.C. § 152, Fourth	6, 11, 13
Section 2, Ninth, 45 U.S.C. § 152, Ninth	12, 13
Revised Rules of the Supreme Court of the United States, Rule 20	3
Rules of National Mediation Board, Rule 6, 29 C.F.R. § 1206.6	5, 6, 7, 9, 10

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NATIONAL MEDIATION BOARD; LEVERETT EDWARDS, Individually and as Chairman of the National Mediation Board; FRANCIS A. O'NEILL, Jr., Individually and as Member of the National Mediation Board; ROBERT O. BOYD, Individually and as Member of the National Mediation Board; WESTERN AIR LINES, INC., Intervenor; SECOND OFFICERS' ASSOCIATION, Intervenor,

RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, WES Chapter, Flight Engineers' International Association, AFL-CIO, prays that a writ of certiorari issue to the Court of Appeals for the District of Columbia Circuit in this case to review the judgment of the United States District Court for the District of Columbia.

OPINION BELOW

There was no written opinion in the District Court. The order of the District Court dismissing the complaint is printed in Appendix A, p. 15, *infra*. The complaint is printed in Appendix B, p. 17, *infra*. Exhibit 5 attached to said complaint is printed in Appendix C, p. 27, *infra;* and Exhibit 7, Appendix D, p. 29, *infra*.

The only action by the Court below was an order on November 6, 1961, granting petitioner's motion that the record be transmitted to this Court for use on petition for certiorari. Respondent Western Air Lines, Inc. (hereinafter "Western") filed an opposition, urging in essence that petitioner's position was not sufficiently meritorious to justify the consideration of this Court prior to the decision below. The Court below rejected this opposition and granted petitioner's motion so that the case would be put before this Court at this time.

JURISDICTION

Jurisdiction for this action was founded upon 28 U.S.C. §§ 1331, 1337, Comp., par. 2, App. B, p. 17, *infra*. Summary judgment against petitioner dismissing its complaint was entered by the United States District Court for the District of Columbia on October 18, 1961. Petitioner docketed its appeal in the United States Court of Appeals for the District of Columbia Circuit by filing the original record in the Court of Appeals on October 25, 1961. Petitioner is invoking the jurisdiction of this Court to grant certiorari before judgment in the Court of Appeals because the issues of judicial review of actions of the National Mediation Board (hereinafter "Board") in labor representation cases arising under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* (hereinafter "Act"), when such administrative actions are alleged to exceed the Board's substantive authority and its procedural powers, and the issue whether the Board has diluted its procedures below the minimum standards imposed by the Due Process Clause—issues pending before the Court upon the petition in *UNA Chapter*,

Flight Engineers' International Association, AFL-CIO v. *National Mediation Board, et al.*, No. 531, October Term, 1961—are so amplified and illuminated by the record herein as to render concurrent consideration of the cases a matter of "imperative public importance." Rule 20; cf. *Taylor* v. *McElroy*, 360 U.S. 709, 710; *Bolling* v. *Sharpe*, 347 U.S. 497, 498.[1]

QUESTIONS PRESENTED

1. Does the District Court have jurisdiction and power to grant relief over the claim that the Board is destroying petitioner's bargaining and property rights by action taken in plain contravention of the Board's own rules governing the conduct of labor representation elections under the Act?

2. May Board action legally stand which is based upon the Board's violation of one of its own Rules—the Rule that dismissed employees shall be eligible to vote whenever their requests for reinstatement on account of wrongful dismissal are pending before proper authorities?

3. Does the District Court have jurisdiction and power to grant relief over the claim that the Board violated the Due Process Clause, as well as the substantive provisions of the Act, by refusing to require the presence of witnesses whose testimony was essential properly to determine whether a challenged labor organization was assisted by the employer in contravention of the Act, and by deciding

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[1] The primary issue presented on these petitions is jurisdictional, whether the District Court has power to adjudicate a claim and grant relief in Board representation cases *under any circumstances*. The judgment of the Court below that there is no such jurisdiction is reflected in its opinions in the *UNA Chapter* case and in *Airline Stewards and Stewardesses Association, International* v. *National Mediation Board, et al.* U.S. App. D.C. No. 16340, also decided on July 13, 1961, petition for rehearing denied, September 20, 1961, in which we are advised that a petition for certiorari is being prepared and will be filed. In this case, the District Court orally indicated its reliance upon these decisions of the Court of Appeals, as well as *Switchmen's Union* v. *Board*, 320 U.S. 297. It would appear that the Court below would invariably deny jurisdiction over any claimed excess or abuse of the Board in a representation case, until this Court directs otherwise.

on the basis of such an incomplete hearing that the organization was not thus unlawfully assisted?

4. Does the Board procedure described in the foregoing Question invalidate any administrative action taken pursuant thereto?

STATUTES INVOLVED

The statutory and administrative provisions involved in this case are set out in Appendix E, p. 30, *infra*.

STATEMENT

Background

Petitioner is a labor organization composed of flight engineers employed by Western; and its sole function and reason for existence is collective bargaining representation of these employees. Petitioner had been the duly certified representative under the Act, and had collective bargaining agreements with Western, for some years, until the events involved herein.

On February 17, 1961, in reaction to the decision of the Board which led to the *UNA Chapter* case, *supra*, pending on the companion petition, the flight engineers employed by many air lines, including Western, walked off their jobs. Upon the intercession of the Executive Branch and the personal participation of the Secretary of Labor, the walkout ended on or about February 23, with the creation of a Presidential commission to consider the issues involved, Executive Order 10921, 26 Fed. Reg. 1553, amended for the express purpose of including Western by Executive Order 10922, 26 Fed. Reg. 1655, and with a back-to-work agreement pledging the air lines not to engage in legal or disciplinary action against the flight engineers. Alone of all the airlines involved, Western refused to accept this agreement.

Western fired each and all of its flight engineers represented by petitioner, between February 19 and 23, 1961, for refusing to accept flight assignments during the walkout. Comp., par. 10, App. B, p. 19, *infra*. On or about February 23, 1961, each of these employees made an uncon-

ditional offer to return to work, pursuant to the Executive Orders. Prior to and subsequent to said offers to return to work, Western employed individuals who were designated as "second officers" in place of the discharged flight engineers.

ACTIONS OF THE BOARD

On or about April 5, 1961, respondent Second Officers' Association (hereinafter "SOA"), an unincorporated association composed of the replacement "second officers," filed an application with the Board to represent the Western flight engineers. Two different actions of the Board in dealing with that application gave rise to this litigation.

1. The Board ruled that only flight engineers on the current payroll of Western would be permitted to vote in a labor representation election ordered by the Board, rejecting petitioner's demand that the Board's own Rule 6 be applied to make eligible the flight engineers represented by petitioner who had been dismissed. Rule 6, 29 C.F.R. § 1206.6, set out in its entirety at App. E, p. 32, *infra*, reads in pertinent part as follows:

> "Dismissed employees whose requests for reinstatement account of wrongful dismissal are pending before proper authorities * * * are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal."

Petitioner advised the Board that these flight engineers came within each requirement of the Rule. They had been dismissed by Western for failure to accept a flight assignment, and so were "dismissed employees". Further, they satisfied the only other requirement to be eligible to vote under Rule 6, that their requests for reinstatement on account of wrongful dismissal be "pending before proper authorities". Petitioner specified the following three proper authorities:

A. The United States District Court for the Southern District of California, in Civil Action No. 510-61-PH, wherein each of these employees, as parties defendant, had filed a counterclaim demanding restoration and reinstatement to his job.

B. The System Board of Adjustment established by the agreement between petitioner and Western, pursuant to which petitioner had submitted grievances to the effect that these discharges "were made without sufficient cause and that each of these employees should be reinstated with back pay forthwith."

C. The Presidential Commission appointed pursuant to the Executive Orders.

In the face of this showing, the Board said, on July 20, 1961, that petitioner's objections to the electorate based on Rule 6 were "without merit under the Board's rules." App. D, p. 29, *infra*. No explanation or further word has ever been tendered by the Board.

2. Upon being notified of SOA's application, petitioner advised the Board, upon information and belief, that SOA was an organization illegally assisted by Western in violation of Sections 2, Third and 2, Fourth of the Act, set out at App. E, pp. 30-31, *infra*. See Comp., pars. 13-17, App. B, pp. 20-22, *infra*, for the factual allegations regarding this claim. Petitioner requested a hearing on the issue of SOA's being formed and making application to the Board in violation of the Act, and the Board granted a "public hearing."

Prior to the hearing, petitioner advised the Board that the basic proofs as to the relationship between Western and SOA were in the possession and control of those parties rather than the petitioner; and requested the Board to make available at the hearing certain witnesses and documents specified by petitioner as necessary to a proper record and decision on this issue.

The Board refused to make the requests for the evidence specified by petitioner. Petitioner thereupon itself requested this evidence from Western and SOA. At the hearing, however, none of this evidence was produced, except for the appearance of an SOA officer, who claimed lack of information or knowledge in response to the questions put by petitioner relating to the facts and documents demonstrating violation of the Act.

The Board then made a finding "that no fact was established from which even an inference—to say nothing of a

conclusion—can be drawn supporting either of the charges made by" petitioner. App. C, p. 28, *infra*. The Board's decision made no reference to the requests for evidence which the petitioner had submitted to the Board, nor to the fact that it had refused these requests. It recited that "A representative of the carrier was also present by invitation of the Board," without mentioning that this "representative" (an attorney) was present only as an observer and did not participate in the hearing, nor that Western's Director of Labor Relations, one of the witnesses whose presence was requested by petitioner and the one with knowledge of the allegedly unlawful activities of Western, did not appear.

Actions of the Court Below

When the Board proceeded to direct an election and to conduct a mail ballot, to be counted on August 7, 1961, petitioner instituted this suit, in essence seeking to restrain and invalidate any further action which the Board might take on the assumpton that its administrative actions summarized above could be considered lawful. See App. B, p. 17, *infra*. The complaint recited the facts summarized above, attaching the pertinent documents which recorded them; and stated the two principal claims of fatal defect in the Board's action revealed by those facts—that the Board had violated its own Rule 6 in declaring ineligible the flight engineers represented by petitioner; and that the Board had violated its statutory responsibilities and duties, and the Due Process Clause of the Federal Constitution, in its decision and the "hearing" on the unlawful assistance issue.

With the complaint, petitioner filed motions for a temporary restraining order and a preliminary injunction. The former was granted on August 3, 1961 (*per* Pine, C. J.); the latter was denied on August 17 (*per* Hart, J.).

The Board then proceeded to the counting of the ballots and the certification of SOA. According to the affidavit of a Vice President of Western, submitted by the Government in support of its motion and incorporated in the rec-

ord on file with the Clerk of this Court, the number of dismissed flight engineers belonging to petitioner, who would have been eligible to vote had the Board adhered to its Rule, was 123. According to the Board's certification (likewise part of the record herein), the total number of ballots cast in the election was 93.

On October 18, 1961, after the hearing on the motions which meanwhile had been filed by petitioner for summary judgment and by the Government (with whose motion Western and SOA associated themselves upon their being granted intervention) to dismiss or alternatively for summary judgment, the District Court (*per* Holtzoff, J.) dismissed the complaint for failure to state a claim on which relief could be granted. This was the only ground included in the signed Order; additional statements that the Court lacked jurisdiction and that no substantial constitutional questions were presented, contained in the draft order submitted by the Government, were excised by the Court. App. A, p. 15 *infra*.

The only action taken by the Court of Appeals, as already noted, p. 2, *supra*, was to grant, over objection, petitioner's motion to transmit the District Court record, filed with that court in docketing the appeal herein, to this Court.

REASONS FOR GRANTING THE WRIT

I

This case, together with the *UNA Chapter* case, *supra*, presents issues of great importance to the proper enforcement of the Act and to administrative law generally, issues which have been resolved below in conflict with the governing decisions of this Court. This case amplifies and illuminates the issues of jurisdiction over substantively excessive and procedurally unconstitutional Board actions in representation cases, by presenting those issues in the context of violation by the Board of one of its own Rules.

In this case the prime claim is that the Board is depriving petitioner of its rights on the basis of an election in which

the Board refused to permit petitioner's members to vote, although they were eligible to vote under the express terms of the Board's own Rule 6. The practical impact of this illegality on this election was decisive, inasmuch as the number of flight engineers belonging to petitioner who were declared not eligible to vote much exceeded the number of those who voted. See p. 8, *supra*. In sum, the Board's knowing refusal to enforce its own rule dictated this election result.

When the District Court dismissed the complaint for failure to state a claim upon which relief could be granted, it held that Board actions in representation cases under the Act are immune from any judicial review or redress. Its judgment cannot stand if there is continuing vitality to the judgment of this Court in *Leedom* v. *Kyne*, 358 U. S. 184, and *Accardi* v. *Shaughnessy*, 347 U. S. 260.

Leedom v. *Kyne* held that there was jurisdiction, that the law does "afford a remedy" when there has been " 'unlawful action of the Board which has inflicted any injury on the respondent'." 358 U. S. at 189. Here the District Court has held precisely to the contrary—that a claim of unlawful action by this Board inflicting injury upon this petitioner can have no possible remedy under the law.

While *Leedom* v. *Kyne* involved a different statute and a different agency, the factual context was the same, an administrative determination of who should vote in a labor representation election; and this Court clearly indicated that the principle of judicial review of excessive agency action was to be applied generally. Indeed, the Court reflected an express judgment that the principle should apply to this Board. It fully discussed *Switchmen's Union* v. *Board*, 320 U. S. 297, which did involve this Board and this Act. 358 U. S. at 189-91; 194, 197-201 (dissenting opinion). And it expressly reconciled the *Switchmen's* holding with the *Leedom* v. *Kyne* principle. 358 U. S. at 189-190.

Moreover, the Court has indicated that *Leedom* v. *Kyne* has been assimilated into the general law of judicial review of administrative action. In *Schilling* v. *Rogers*, 363 U. S. 666, 676-677, for example, where it denied review upon the

conclusion that the complaint alleged merely that the administrative decision was erroneous, the Court cited *Leedom* v. *Kyne* in its description of the type of case where jurisdiction was to be upheld:

> "This is not a case in which it is charged either that an administrative official has refused or failed to exercise a statutory discretion, or that *he has acted beyond the scope of his powers*, where the availability of judicial review would be attended by *quite different considerations* than those controlling here. Cf., *e.g.*, *Accardi* v. *Shaughnessy*, 347 U. S. 260; *Leedom* v. *Kyne*, 358 U. S. 184." (Emphasis added.)

Accordingly, *Leedom* v. *Kyne* is governing here to establish jurisdiction to grant relief on petitioner's claim of excessive Board action. The judgment below is in opposition to that of this Court.

Accardi v. *Shaughnessy*, *supra*, held that the Courts would hold administrative agencies to the terms of their regulations as scrupulously as those of statutes, in deciding upon judicial review whether an administrative action could be upheld. The *Accardi* principle has been followed in *Vitarelli* v. *Seaton*, 359 U. S. 535, and *Service* v. *Dulles*, 354 U. S. 363; cf. *Securities and Exchange Commission* v. *Chenery Corp.* 317 U. S. 80.[2] This principle has never

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[2] The Board has consistently adhered to Rule 6, prior to this case. We have found no cases, and none has been cited, where an employee asserting a right to vote under Rule 6 has previously been denied eligibility. Examples of Board decisions enforcing Rule 6 are: *United Air Lines*, Case No. R-1894 (October 10, 1947), where the employer challenged the eligibility of two employees on the ground that they had been terminated, while the Union contended that their suspensions had been improper; the Board permitted their votes to be counted because "there is a dispute between the carrier and the organization concerning the suspension" of the employees "which places these employees in the category described" in Rule 6; and *Minneapolis & St. Louis Ry. Co.*, Case No. R-2767 (April 2 and June 17, 1954), where the Board permitted an employee to vote, although he had been found guilty of a rules violation and barred from further service as a locomotive engineer, because a Union was handling a claim for reinstatement with the proper officers of the carrier, thus establishing eligibility under Rule 6.

been attenuated, let alone overruled, by this Court. Here the District Court has held precisely to the contrary—that this Board regulation may be violated and petitioner's rights thus destroyed, with the Board's action nevertheless to be left standing and effective upon the ground of utter lack of judicial power.

The principles of *Leedom* v. *Kyne* and *Accardi* v. *Shaughnessy* are manifestly of general applicability and major importance. They should not be disregarded or eroded by flatly contrary judgments of the lower Federal Courts. To vindicate those principles and in a proper case to assert the necessary supervisory powers of this Court, the petitions in this cause and in *UNA Chapter* should be granted.

II

An additional facet of the scope of judicial review of Board conduct in representation cases is presented here by the Board's failure and refusal to comply with the requirements of the Act regarding petitioner's allegation that SOA was employer dominated. This Board conduct raises the "important questions" which led to the grant of the petition for certiorari in *Order of Conductors* v. *Penna. R. Co.*, 323 U. S. 166, 171, but which the Court did not decide because the Board was not there a party. Here the Board and its members are parties respondent, and these important questions should be answered by this Court.

In both cases the questions are directed to the Board's duty under the Act and the jurisdiction of the District Court to compel the fulfillment of that duty—to entertain representation applications, and make certifications, of only those organizations which have been formed and have obtained their membership in compliance with the Act. In *Order of Conductors, supra*, the Board took the position that it had no jurisdiction to decide issues such as unlawful interference or assistance—violations of Sections 2, Third and 2, Fourth, set out in App. E, pp. 30-31, *infra;* and precisely the acts alleged by petitioner against Western and SOA in the complaint in this case—whereas in this case

the Board did purport to adjudicate it. Under the allegations of the complaint, however, the Board's disposition of this matter was so obviously incomplete and unfair as to be tantamount to the abnegation of the Board's power and duty to adjudicate involved in the *Conductors* case. See App. B, pp. 20-22, *infra*.

The Board here refused to utilize powers readily available to it to make rational consideration possible of petitioner's allegations that Western had unlawfully assisted SOA. The Board refused to request Western's Director of Labor Relations to be present at the "public hearing" it scheduled, although this was the Company officer who petitioner said would have knowledge of the facts involved. The Board refused to request the SOA officers specified by petitioner as having the pertinent knowledge to be present at this "hearing," although SOA was the applicant; and as the applicant, SOA was obligated under the Act to prove its compliance with the Act to the satisfaction of the Board. Until compliance with the Act were proved, the Board was certainly under no compulsion to proceed with the processing of SOA's application; indeed, the Board was prohibited under the Act from certifying SOA. In addition, the Board refused to request Western to make available to petitioner certain documents such as correspondence with SOA which, petitioner stated, were manifestly germane to the assistance issue. The Board apparently regarded itself as impotent to investigate and obtain all needed evidence—but the Board expressly has power, under the last sentence of Section 2, Ninth, App. E, p. 31, *infra*, to investigate the books and records of the carrier, and to "utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

The procedure followed by the Board on this issue was a transparent sham. The Board should have regarded its function as properly deciding whether or not SOA was unlawfully assisted and therefore ineligible for certification. Its procedural powers should have been exerted to insure a complete and fair hearing on this issue, with all parties

being required to the utmost provided by the Act to produce for Board consideration all the testimony and evidence at their command. Instead, the Board confined its purpose to dismissing the petitioner's allegations; and to this end it restricted the hearing to the presentation of evidence by the petitioner. It is self-evident, however, that the issue could not possibly be fairly tried or lawfully decided on the basis of the petitioner's evidence. After all, unlawful domination and assistance of a union by an employer is a conspiratorial and wilful enterprise; the Board surely knew such an illegal relationship could not be proved when the allegedly illicit partners are not even requested, let alone compelled so far as the law permits, to disclose all the evidence they have; and, indeed, are sheltered by the Board from any official request that all such necessary and readily available evidence be put before the Board before any decision could be made.

Such an administrative procedure and decision falls fatally short of the standards imposed by the Act and by the "public hearing" the Board purported to give, cf. *Accardi* v. *Shaughnessy, supra;* and offends the Due Process Clause of the Constitution. This Court should not tolerate any holding that such an administrative performance is immune to judicial review and redress. Our Federal Courts are not so impotent to protect private individuals and institutions from the encroachments of administrative officials.

This jurisdictional question of judicial review of unconstitutional procedure, in the context of representation cases under the Act, an issue presented on the petition in the *UNA Chapter* case, *supra*, is presented here in a somewhat different setting which illuminates and clarifies the reach of the vital legal issues involved in the *UNA Chapter* case. In addition, the deliberately restricted Board procedures here raise questions, the importance of which this Court has recognized, addressed to the interpretation of Sections 2, Third, 2, Fourth, and 2, Ninth, and the Board's powers and duties thereunder. For this reason also this petition should be granted.

CONCLUSION

For the reasons set forth herein, this petition for writ of certiorari should be granted, as well as that in the *UNA Chapter* case, No. 531, October Term, 1961, the companion petition; and these cases set down for argument together.

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November, 1961.

APPENDIX A

United States District Court

FOR THE DISTRICT OF COLUMBIA

WES CHAPTER, FLIGHT ENGINEERS' INTERNATIONAL ASSOCIATION, AFL-CIO *Plaintiff*, v. NATIONAL MEDIATION BOARD, ET AL., *Defendants*.	Civil Action No. 2509-61

ORDER

Upon consideration of defendants' Motion To Dismiss Or, In The Alternative, For Summary Judgment, plaintiff's Motion For Summary Judgment, and the Opposition Of Intervenor Western Air Lines, Inc. To Plaintiff's Motion For Summary Judgment, and intervenors having joined in the said motion of defendants, and the Court having further considered the pleadings, affidavits and exhibits of record, and the parties having filed memoranda of points and authorities in support of and in opposition to the said motions, and after hearing oral argument by counsel for the respective parties in open Court, and the Court having determined that there is no genuine issue of material fact, ~~and it appearing to the Court that the Court has no jurisdiction over the subject matter, that no substantial Constitutional question is presented,~~ and that the complaint fails to state a claim upon which relief can be granted, it is by the Court on this 18th day of October, 1961.

ORDERED that defendant's [sic] Motion For Summary Judgment be and the same is hereby granted, and it is

FURTHER ORDERED that defendants' alternative Motion To Dismiss be and the same is hereby denied as moot, and it is

FURTHER ORDERED that plaintiff's Motion For Summary Judgment be and the same is hereby denied and the complaint be and the same is hereby dismissed.

(s) ALEXANDER HOLTZOFF
United States District Judge

APPENDIX B

[Caption Omitted]

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

1. This is an action of a civil nature to compel compliance by the National Mediation Board (hereinafter "the Board") with the Act creating and defining its authority in labor disputes, the Railway Labor Act, 45 U.S.C.A. § 151 et seq. (hereinafter "the Act"). In particular, this is an action to vacate the orders, rulings, and directions of election, entered on June 21, 1961, July 20, 1961, and July 21, 1961 by the Board, denying members of Plaintiff the opportunity to vote in said election, determining that the Second Officers' Association is qualified under the Act to participate in an election among the class or craft of flight engineers employed by Western Air Lines (hereinafter "Western"), and permitting employees of Western to vote who were hired in violation of the Act. The Plaintiff also seeks injunctive relief against the Board restraining and enjoining it from denying Plaintiff due process of law and from acting in an unlawful, arbitrary and capricious manner, and for a declaratory judgment and for other relief.

2. The jurisdiction of this court is founded upon 28 U.S.C.A. § 1337, vesting jurisdiction in this court of an action or proceeding arising under an act of Congress regulating commerce, upon 28 U.S.C.A. § 1331, upon the Railway Labor Act, 45 U.S.C.A. § 151 et seq., upon the Administrative Procedures Act, 5 U.S.C.A. § 1009 et seq., and upon the Declaratory Judgments Act, 28 U.S.C.A. § 2201 et seq. The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000) exclusive of interest and costs.

3. Plaintiff, WES Chapter, Flight Engineers' International Association—AFL-CIO (hereinafter sometimes referred to as "the Association") is an unincorporated voluntary labor organization, designated and authorized under the Act as the collective bargaining representative of all employees of Western in the class or craft of flight engineers.

4. Defendant Board is an agency of the United States Government, created and governed solely by the Act. Its members are the individual Defendants Leverett Edwards who is Chairman, Francis J. O'Neill, Jr. and Robert O. Boyd. Said individual Defendants collectively constitute "the Board." The offices of each and all these Defendants are located, and they are each and all to be found, within the District of Columbia.

5. Western Air Lines, Inc. (hereinafter "Western") is a corporation organized and existing under and by virtue of the laws of the State of Delaware, having its principal place of business at 6060 Avion Drive, Los Angeles, California. Western is an air carrier engaging in the transportation by air of passengers, property, and mail in and between twelve (12) western states and Canada and Mexico, pursuant to Certificates of Public Convenience and Necessity issued by the United States Civil Aeronautics Board.

6. Plaintiff was certificated by the Board in Case No. R-3209 on October 22, 1957 as the representative of the class or craft of "flight engineers" employed by Western. Plaintiff has at all times since then been recognized by Western as the representative of its flight engineers and has from time to time entered into collective bargaining agreements with Plaintiff covering said flight engineers. On April 11, 1958 Plaintiff and Western entered into a collective bargaining agreement establishing rates of pay, rules and working conditions of flight engineers employed by Western. On April 11, 1958, Plaintiff and Western also entered into an agreement establishing a Western Air Lines Flight Engineers' System Board of Adjustment (hereinafter "System Board"), pursuant to and in compliance with specifically Section 204 of the Act, 45 U.S.C.A. § 184. By their terms both of these agreements were to continue in full force and effect until January 1, 1961, and to be subject to change as provided for in Section 6 of the Act, 45 U.S.C.A. § 156.

7. The collective bargaining agreement is now and at all times since January 1, 1961, has been in full force and

effect as a result of a notice of change given by Plaintiff on November 28, 1960, pursuant to Section 6 of the Act. Neither Plaintiff nor Western has reopened the System Board agreement and it remains in full force and effect.

8. The collective bargaining agreement contains provisions for the making and handling of grievances, and the agreement establishing the System Board declares, as provided in the Act, that the System Board shall have jurisdiction over disputes growing out of grievances or out of interpretation or application of any of the terms of the collective bargaining agreement.

9. On February 17, 1961, flight engineers employed by many of the certificated air carriers, including Western, walked off their jobs. As a result of the mediatory efforts of the Secretary of Labor and the Executive offices of the President of the United States, the flight engineers entered into a back-to-work agreement and the walkout terminated on February 23, 1961. The back-to-work agreement was entered into between the flight engineers and all of the affected carriers other than Western who refused to be a party to the back-to-work agreement. The back-to-work agreement provided that in return for a promise by the flight engineers to return to work, each carrier would terminate all company disciplinary action and all legal actions against the flight engineers. At the same time, the President of the United States by Executive Order No. 10921 established a commission to study the issues out of which the walk-out occurred. Presidential Executive Order No. 10922 amended No. 10921 to include Western within the jurisdiction of the commission.

10. Between February 19 and February 23, 1961, Western fired each and all of its flight engineers represented by Plaintiff. On or about February 23, 1961, Western refused the unconditional offer of the flight engineers to resume their duties as flight engineers which offers were made pursuant to the back-to-work agreement and Presidential Executive Order 10922. Prior to and subsequent to said offers to return to work, Western had employed individuals

classified as "second officers" in the place and stead of said discharged flight engineers.

11. Plaintiff is informed and believes and therefore states as a fact, that said "second officers" are performing the same duties as were performed by the flight engineers, but that the wages, hours and conditions of employment of said "second officers" have not been in accordance with Western's collective bargaining agreement with Plaintiff. On April 7, 1961, Western submitted to the System Board (described in paragraphs 6, 7 and 8 *supra*) the question whether said "second officers" are employed in compliance with said collective bargaining agreement.

12. On or about April 5, 1961, the Second Officers' Association, (hereinafter "SOA") an unincorporated association consisting of said replacement "second officers," made application to the Board for an election under Section 2, Ninth of the Act, alleged a dispute existed among the flight engineers employed by Western and sought to represent said employees for collective bargaining purposes. On April 12, 1961, the Board notified Plaintiff that SOA had applied to be certificated as the representatives of flight engineers employed by Western. A copy of said notification is attached hereto as Exhibit 1.

13. On April 17, 1961, Plaintiff replied to said application of SOA and alleged *inter alia* upon information and belief that SOA was an organization illegally assisted by Western in violation of Section 2, Third and Section 2, Fourth of the Railway Labor Act, and requested a public hearing on this question. The Board, after docketing the application of SOA as Case No. R-3483 on April 21, 1961, notified Plaintiff that a "public hearing" would be held. This NOTICE OF HEARING is attached hereto as Exhibit 2.

14. On May 17, 1961, in a letter to the Board, Plaintiff requested the Board, pursuant to the terms of the last sentence of Section 2, Ninth of the Act, to see to it that there was present at said public hearing Mr. T. S. Shrader, Director of Labor Relations, Western Air Lines, and Messrs. Bruggemeyer, Avery and Beckstead, President,

Vice President and Secretary of SOA, respectively. Plaintiff also requested that certain described documents, which would show the unlawful conspiracy between Western and SOA, be made available to Plaintiff at said public hearing. In the alternative, Plaintiff requested that the Board issue subpoenas, in accordance with Section 6(c) of the Administrative Procedure Act, 5 U.S.C.A. § 1005(c), requiring the presence of the above-named persons and the production of the described documents so that the Board would have before it all facts essential to a determination on the merits of Plaintiff's allegations. This letter to the Board is attached hereto as Exhibit 3.

15. The Board, in a letter dated May 22, 1961, in complete abdication of its responsibility of Section 2, Ninth of the Railway Labor Act, notified Plaintiff that Plaintiff would have the burden of presenting evidence in support of its allegation of illegal assistance, and the Board refused the requests of Plaintiff described in paragraph 14, *supra*, which if complied with would have permitted Plaintiff to establish the unlawful assistance by Western. The letter of the Board is attached hereto as Exhibit 4. Thereupon Plaintiff requested Messrs. Shrader and Bruggemeyer to personally appear at the hearing and produce the requested witnesses and documents. These requests were also refused. As a result of the refusal by the Board to honor the requests of Plaintiff, and as a result of the refusals by Messrs. Shrader and Bruggemeyer, the burden imposed upon Plaintiff by the Board was improper and arbitrary.

16. The only witnesses made available to Plaintiff at the "hearing" which was held on May 26, 1961, in Los Angeles, Calif., were Messrs. Beckstead and Dent, Secretary and Treasurer of SOA respectively. When questioned by Plaintiff at the "hearing," Messrs. Beckstead and Dent did not deny the existence of facts, documents, meetings and discussions which would have, if their existence had been made known to the Board, established Western's unlawful assistance. On the contrary, both Messrs. Beckstead and Dent claimed that they were without sufficient know-

ledge and information upon which to answer the questions. Messrs. Shrader, Bruggemeyer, and Avery, who, as related in paragraphs 14 and 15, supra, were requested to appear, and who were the only persons with personal knowledge and information of the unlawful assistance, were not present at the "hearing." As a matter of law, therefore, Plaintiff was denied an opportunity to present evidence of the illegal assistance and consequently was denied a hearing by the Board despite the fact that the Board had ordered one to be afforded Plaintiff. As a matter of law, these denials constitute a deprivation of due process to Plaintiff.

17. The Board, on June 21, 1961, issued its FINDINGS UPON INVESTIGATION in Case No. R-3483 in which it found, without referring to the fact that Plaintiff had been denied access to documents and witnesses, that the allegations of Plaintiff of illegal assistance by Western were not substantiated. This FINDINGS is attached hereto as Exhibit 5.

18. On June 22, 1961, the Board, in reply to a request by Plaintiff for an extension of time in which to present Plaintiff's position with respect to the eligibility lists to be used in the conduct of the representation, denied the request of Plaintiff and stated that any question on eligibility should be presented *to the mediator* assigned by the Board to investigate the application of SOA.

19. On July 5, 1961, Plaintiff was notified by the mediator that he was without authority to act on Plaintiff's contentions with respect to the eligibility list, that only flight engineers presently employed by Western were eligible and would be permitted to vote in the representation election requested by SOA, that members of Plaintiff who had been discharged, as related in paragraph 10 *supra*, were not eligible to vote and would not be permitted to do so. Thereupon the Board, in response to a telegram from Plaintiff, notified Plaintiff that only *the Board, and not the mediator*, could dispose of Plaintiff's contentions with respect to the eligibility list.

20. Plaintiff, in a letter dated July 8, 1961, formally requested the Board to declare said discharged flight engineers as eligible to vote in any election to be held among the flight engineers on Western upon the application filed by SOA. Plaintiff notified the Board that the refusal by the mediator to declare said discharged members of Plaintiff eligible to vote was in direct conflict with, and in contravention of, the express provisions of Rule 6 of the Board's Rules and Regulations, 29 C.F.R. § 1206.6. Rule 6 specifically provides in pertinent part:

> "*Eligibility of dismissed employees to vote.* Dismissed employees whose requests for reinstatement account of wrongful dismissal *are pending before proper authorities*, which includes the National Railroad Adjustment Board or other appropriate adjustment board, are eligible to participate in elections among the craft or class of employees in which they are employed at time of dismissal." (Emphasis added)

Plaintiff informed the Board that the issues of the reinstatement of the discharged Western flight engineers was pending before at least three "proper authorities," namely: (1) a System Board of Adjustment, in accordance with terms of the collective bargaining agreement described in paragraph 8, *supra*; (2) a United States District Court, Southern District of California, in Civil Action No. 510-61-PH; (3) and the President's "Commission on the Airlines Controversy" established under Executive Orders 10921 and 10922, as related in paragraph 9, *supra*. This letter, with attachments, is attached hereto as Exhibit 6.

21. On July 20, 1961, Plaintiff received a telegram from the Board in reply to Plaintiff's letter described in paragraph 19, *supra*. The Board informed Plaintiff in said telegram that it had determined Plaintiff's objections set forth in said letter to be "without merit under the Board's rules and that no sufficient cause has been presented under such rules for additional delay of the election" in Case No. R-3483. Said telegram further informed Plaintiff that the election would be conducted by sending mail ballots to

only those flight engineers "currently employed by Western." This telegram is attached hereto as Exhibit 7.

22. On July 21, 1961 the Board, by Mediator Wyatt, issued a formal NOTICE OF ELECTION to be held under the Railway Labor Act involving flight engineers. The NOTICE OF ELECTION provided that only employees appearing on the payrolls of Western on July 15, 1961 would be eligible to vote in this election. The ballots are returnable to the mediator in Alexandria, Virginia on August 7, 1961.

23. The aforesaid orders of the Board determining that the flight engineers who were discharged by Western, but whose reinstatements are now pending before several proper authorities, are in direct violation of the Rules and Regulations of the Board and in direct violation of the Railway Labor Act which guarantees to these individual members the right to be represented by a representative of their own choosing. The aforesaid orders of the Board determining that SOA may properly appear on the ballot and represent flight engineers employed by Western denied Plaintiff due process of law in violation of the Fifth Amendment of the Constitution of the United States insofar as said orders were based upon the purported "hearing" on the issues raised by Plaintiff of Western's illegal assistance to SOA.

24. Plaintiff, and each individual flight engineer represented by said Plaintiff, will suffer irreparable injury unless this court enjoins the National Mediation Board from conducting the aforesaid election, counting ballots, and certifying any representative of flight engineers employed by Western other than the Plaintiff. There is no remedy available other than the relief sought herein. Unless such relief be granted by this Court, the rights of Plaintiff to represent the Western flight engineers, the rights of its membership to be represented by Plaintiff, and rights of property and status of great value enforceable under the Railway Labor Act and Constitution will be irreparably damaged and destroyed in violation of the Act and the

Constitution. Money damages can never compensate for the loss of these rights and status.

WHEREFORE, Plaintiff respectfully requests the Court to enter an order:

1. Enjoining and restraining, pending the final disposition of this cause, and permanently, Defendants National Mediation Board, its Chairman and members, and its agents, from conducting any election, counting ballots, or certifying a representative among the class or craft of flight engineers on Western;

2. Impounding the ballots, if said election has already been started, before they are opened and counted;

3. Staying or suspending, if said ballots have already been counted, any certification until the final and effective judicial determination of whether the discharged flight engineers are eligible to participate in said election, and whether SOA may properly participate in such election and represent the class or craft of flight engineers employed by Western;

4. Setting aside and vacating the orders of the National Mediation Board entered in Case No. R-3483 on June 21, 1961, July 20, 1961, and July 21, 1961, and declaring that the Railway Labor Act does not confer jurisdiction or authority upon the Board to certify the SOA as the representative of the craft or class of flight engineers employed by Western;

5. Providing such other and further relief, orders and decrees as shall in the premises seem meet and just and equitable to this Court.

ZIMRING, GROMFINE AND STERNSTEIN
1001 Connecticut Avenue
Washington, D. C.

By: (s) HERMAN STERNSTEIN
(s) WILLIAM B. PEER
Attorneys for Plaintiff

August 3, 1961.

AFFIDAVIT

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES } ss.

ARNE L. ANDERSON, being first duly sworn according to law, deposes and says that he is the President of WES Chapter, Flight Engineers' International Association, AFL-CIO, Plaintiff herein; that he has read the foregoing Complaint and knows the contents thereof; and that the allegations of fact therein are true to his knowledge, except as to those stated on information and belief, and that as to those, he believes them to be true.

(s) ARNE L. ANDERSON

SUBSCRIBED AND SWORN to before me this 1st day of August, 1961.

(s) LOU H. GREEN

Notary Public in and for said county and state.
My Commission expires June 24, 1965

APPENDIX C

(Complaint, Exhibit 5)

NATIONAL MEDIATION BOARD
WASHINGTON

In the Matter of the Application of THE SECOND OFFICERS' ASSOCIATION alleging representation dispute pursuant to Section 2, Ninth, of the Railway Labor Act involving employees of WESTERN AIR LINES, INC.	CASE NO. R-3483 FINDINGS UPON INVESTIGATION June 21, 1961

On or about April 5, 1961, The Second Officers' Association, an unincorporated association, made application to the National Mediation Board for an election under Section 2, Ninth, of the Railway Labor Act, and alleging a dispute existing among the employees of Western Air Lines, Inc., known as Flight Engineers, as to who should represent such employees for collective bargaining purposes. After a preliminary investigation, the application was docked as NMB Case No. R-3483. At that time the employees involved were represented by the Flight Engineers' International Association, AFL-CIO, under a certificate issued in Case R-3209 on October 22, 1957.

On or about April 17, 1961, the FEIA, by their counsel Zimring, Gromfine and Sternstein, filed charges with the Board alleging that The Second Officers' Association had been illegally assisted by the carrier (Western Air Lines, Inc.) and that the authorization cards obtained by the Association were solicited with the assistance of the Carrier, all in violation of the Railway Labor Act. The FEIA requested that a public hearing be held during the investigation of the dispute. On May 17, 1961, the Board gave notice of a hearing to be held in Los Angeles, California, on May 26, 1961, and in accordance with such notice a public hearing was held in Los Angeles before Member

Robert O. Boyd. At the hearing the FEIA and The Second Officers' Association were represented by counsel. A representative of the carrier was also present by invitation of the Board.

The issue raised by the charges made by FEIA was whether or not interference by the Carrier was such as to prevent a free and unfettered choice of a representative in any election that might be held among the Flight Engineers.

The Board has carefully reviewed the transcript of the hearing and has also examined photostatic copies of the minutes of the several meetings of The Second Officers' Association, as well as a copy of their proposed Constitution and By-Laws. It is not necessary here to review the testimony presented at the hearing. It is sufficient to say that no fact was established from which even an inference—to say nothing of a conclusion—can be drawn supporting either of the charges made by FEIA.

The Board, therefore, directs that the investigation of the disputed alleged in the application of The Second Officers' Asociation be progressed to a conclusion under the rules and practices of the Board.

By direction of the NATIONAL MEDIATION BOARD.

(s) E. C. THOMPSON
Executive Secretary

APPENDIX D

(Complaint, Exhibit 7)

WESTERN UNION
TELEGRAM

1961 JUL 20 AM 11 19

TXA032 WA 181

(TM) LONG PD FAX WASHINGTON DC 20 1015A EDT
I J GROMFINE, ZIMRING GROMFINE & STERNSTEIN
1001 CONNECTICUT AV NORTHWEST WASHDC

THE NATIONAL MEDIATION BOARD HAS FULLY CONSIDERED ALL OF THE OBJECTIONS PRESENTED OR ASSERTED BY YOU IN CONNECTION WITH NMB CASE NO.; 4-3483 AND FINDS THEY ARE WITHOUT MERIT UNDER THE BOARD'S RULES AND THAT NO SUFFICIENT CAUSE HAS BEEN PRESENTED UNDER SUCH RULES FOR ADDITIONAL DELAY OF THE ELECTION IN THIS CASE. ALL OF SAID OBJECTIONS AND REQUESTS BASED THEREON ARE ACCORDINGLY OVERRULED. THE BOARD IS ALSO OF THE OPINION THAT NO FURTHER HEARING OR ARGUMENT IS NECESSARY OR JUSTIFIED UNDER THE SHOWING MADE AND REQUEST FOR SAME IS DENIED. ON BASIS OF MEDIATOR'S REPORT OF HIS CHECK OF AUTHORIZATIONS, THE BOARD HAS FOUND THAT A REPRESENTATION DISPUTE EXISTS AMONG FLIGHT ENGINEERS CURRENTLY EMPLOYED BY WESTERN AIR LINES, INC., AND DIRECTS THAT A MAIL BALLOT ELECTION BE CONDUCTED AMONG THESE EMPLOYEES FORTHWITH, USING ELIGIBLE LIST PREPARED BY THE MEDIATOR.

BY ORDER OF THE NATIONAL MEDIATION BOARD

E C THOMPSON EXEC SEC'TY NATIONAL MEDIATION BOARD

APPENDIX E

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

"No person shall * * * be deprived of life, liberty, or property, without due process of law * * *."

Railway Labor Act, 45 U. S. C. § 151 et seq.:
Section 2, Third, 45 U. S. C. § 152, Third:

"Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier."

Section 2, Fourth, 45 U. S. C. § 152, Fourth:

"Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or

to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided*, That nothing in this Act shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees from conferring with management during working hours without loss of time, or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."

Section 2, Ninth, 45 U. S. C. § 152, Ninth:

"If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."